*HON'BLE SRI JUSTICE L.NARASIMHA REDDY

+WRIT PETITION Nos.22311 & 22877 OF 2005

% 9th November 2005

M/s.Kay Vee Enterprises

…Petitioner

And

$ The Jawaharlal Nehru Technological University,

Masabtank, Hyderabad & another

…Respondents

! Counsel for the petitioner : Mr.S.Ashok Anand Kumar

^ Counsel for respondents : Mr.K.Rathangapani Reddy,

Standing Counsel, and

Mr.M.Subrahmanyam

< Gist:

> Head Note:

? Cases referred:

1. 1994(2) ALT 72 (D.B.)

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COMMON ORDER:

Both the writ petitions are filed by the same agency. The parties are referred to, as arrayed in W.P.No.22877 of 2005.

The petitioner is a registered Class-I contractor. Its annual turnover is said to

be approximately Rs.7.7 crores. The first respondent proposed to bring about the constructions of different categories, worth about Rs.6.6 crores. With a view to select an agency for entrustment of the work and to award the contract, it issued a tender notice, dated 13.6.2005, in addition to inviting tenders through E-procurement. 15.10.2005 was stipulated, as the last date for submission of tenders. The process comprises of technical bid and price bid. The technical bids were scheduled to be opened on 15.10.2005 itself, and the price bids of those, who qualified in the technical bid, were to be opened on 17.10.2005.

Petitioner states that according to the conditions of tender furnished through E-procurement, as well as annexure appended to the tender notice dated 13.6.2005, a formula was adopted to assess the bid capacity, and the same provided for giving weightage of 10%, for the works completed by the respective tenderers, in the process of updating the value. The petitioner complains that notwithstanding these specific stipulations, a clause was incorporated in the tender notice, dated 13.6.2005, directing that no weightage shall be added in the matter of assessment of the bid capacity. W.P.No.22311 of 2005 is filed challenging the action of the respondents 1 and 2, in incorporating a clause to the effect that no weightage will be added. The writ petition came up for admission on 14.10.2005. Pending adjudication of the matter, this Court directed the
respondents 1 and 2, to consider the tender of the petitioner, in accordance with the general conditions appended to the notification, and that in case the petitioner emerges as successful tenderer, further action shall be deferred by two weeks.

The technical bids were opened on 15.10.2005, and the bid capacity of the petitioner was assessed, as per the general conditions. The third respondent emerged as the lowest tenderer, and the petitioner figured next to him. The petitioner contends that the third respondent is not a registered contractor, and as such, his tender ought not to have been received at all, much less, the technical bid or price bid opened. Several contentions are urged by the petitioner. W.P.No.22877 of 2005 is filed challenging the action of the respondents 1 and 2 in considering the tender of the 3rd respondent.

On behalf of respondents 1 and 2, a counter affidavit is filed stating, *inter alia,* that a conscious policy decision was taken to do away with the giving of weightage, in the process of assessing the bid capacity. It is stated that such a clause was not incorporated in the information furnished through E-procurement, on account of failure to change the format, and that the appendix attached to the tender notice was also not changed appropriately, due to inadvertent omission and paucity of time. It is also stated that the experience of the third respondent is vast, from all points of view, and that even after the weightage was given to the petitioner, he stood only as No.2, and as such, he cannot have any grievance in the matter of selection of the third respondent.

The third respondent filed a counter affidavit, opposing the claim of the petitioner. It is stated that there existed a valid registration in favour of it, as Class-I contractor, in the year 1994, and though works of huge value were undertaken by it, it did not get the registration, since its necessity was not felt. It is alleged that an application has been made by the third respondent to the Engineer-in-Chief, and the certification is awaited.

Sri S.Ashok Anand Kumar, learned counsel for the petitioner, submits that there was absolutely no justification for the respondents 1 and 2, in incorporating a clause in the tender notice, to the effect that no weightage will be added. He contends that such a stipulation in the tender would make the very formula adopted by the respondents, unworkable. As regards the eligibility of the third respondent, he submits that when the tender notice unequivocally requires that it is only the registered Class-I contractors that are entitled to submit the tenders, it was impermissible for them to receive the imperfect tender of the third respondent.

Sri K.Rathangapani Reddy, learned Standing Counsel for respondents 1 and 2, submits that it is always open to a tendering agency, to stipulate its own conditions, and the petitioner cannot insist on incorporation, or deletion of any condition. He contends that the rights of respondents 1 and 2, in this regard, are not fettered at all. He further contends that on an evaluation of the experience, it was found that the third respondent has executed several works of very high value,

involving technical expertise. It is also urged that if the third respondent had greater experience and a perfect record, the fact that its registration has not been renewed, cannot disable his clients to select the third respondent.

Sri M.Subrahmanyam, learned counsel for the third respondent, apart from arguing on the lines of the learned Standing Counsel, contends that the purpose of insisting on registration of a contractor, as belonging to a particular class, is only to evaluate the performance, and if such an assessment is undertaken by the tendering agency itself, no exception can be taken to it. Learned counsel relied upon certain precedents, in support of his contention. He further contends that the bid capacity of the third respondent, without giving any weightage, was found to be far superior, than that of the petitioner, even after the latter was given weightage. He ultimately urged that the writ petition deserves to be dismissed.

Respondents 1 and 2 invited tenders for undertaking civil works, worth Rs.6.60 crores. The tender was in two parts, viz. technical bid and price bid. The tender notice was issued in the conventional method, by publishing in the notice, dated 13.6.2005, as well as by keeping the same in the E-procurement. When the tender notice, dated 13.6.2005, and the one in E-procurement, are for one and the same work, both of them ought to have been identical. Not only the form, but also the gist of the tender notice, issued through the said processes, differed with each other, on one substantial aspect. “The eligibility criteria for opening the price bid” in the E-procurement, occurring in clause-4, read as under:

> “i) Satisfactorily completed as Prime contractor similar works of cost not less than Rs.33000000 in any one financial year during the last five financial years i.e., from 2000-2001 to 2004-2005.
>
> ii) Bid capacity computed by the formula (2 AN-B) shall be greater than the ECV.
>
> iii) +Should possess the Key/critical equipment and Key Technical personnel and liquid assets as shown in the tender documents.”

However, in clause (i) of the tender notice, the following sentence was added:

“No weightage will be added.”

In all other respects, it was verbatim similar to the one, published through E-procurement. Variation in such an important condition, would naturally have its own impact. Respondents 1 and 2 ought to have taken proper care to avoid this discrepancy.

Even assuming that the actual decision and intention of the respondents 1 and 2 is reflected in the tender notice, dated 13.6.2005, and omission in the E-procurement, of the clause relating to denial of weightage, was inadvertent, it needs to be seen as to whether such a stipulation can fit into the scheme of the things, at all. In both the tender notices, it was clearly mentioned that the bid capacity shall be computed, on the basis of the formula "(2 AN-B) shall be greater than ECV)". The various factors involved in this formula were detailed in the instructions to tenderers, which were appended to the tender notice. It reads as under:

> "A = Maximum value of civil engineering works executed in its name in any one financial year during the last five financial years (updated to current Price level) taking into account the works completed as well as works in progress.
>
> N = Number of years prescribed for completion of the work for which Tenders are invited (months/12) (9months).
>
> B = Updated value (at current Price level), of all existing Commitments i.e. on going works, works likely to be awarded to be executed during the next 9 months. (Period of completion for which Tenders are invited).
>
> Annual turnover, cost of completed works and balance works on hand etc., shall be updated by giving weightage of 10% per year to bring them to current price level."

From a reading of the same, it is evident that the annual turnover is an important factor, represented by "A", and the formula can be worked out, if only the works executed by a contractor are updated, as provided for in the factor "B". The manner of updating is clearly indicated in the last sentence, and it provides for giving weightage of 10%, per year, to bring them to the current price level. If this weightage were to have been done away with, the formula becomes unworkable, or ought to have properly amended. Addition of the clause, *viz.* no weightage will be added, would render the very evaluation of bid capacity, impossible. Therefore, incorporation of such clause, that too, in one of the tender notices, runs contrary to

the very formula, adopted in the impugned tender notices, and detailed in the appendix, enclosed to it. In that view of the matter, the action of the respondents 1 and 2, in adding the clause that no weightage will be given, cannot be sustained. However, the petitioner cannot have any subsisting grievance, inasmuch as he did not emerge as the successful tenderer, even after the weightage was given to him.

The other grievance of the petitioner is about permitting the third respondent to participate in the tenders. In the tender notice, the eligibility of tenderer is indicated, as under:

"4) Form of contract/class : L.S.

of contractor eligible. Class I(Civil) and Higher,

G.O.Ms.No.94, Irr&CAD,

(PW&COD) Dept., dated

1.7.2003."

To the same effect are the stipulations under E-procurement, though in a detailed and different form. It is not in dispute that the third respondent is not a registered contractor. According to it, its for grant of registration is pending with the Engineer-in-Chief. The petitioner points out that the respondents 1 and 2 ought not to have accepted the tender of the third respondent, in anticipation of registration. It was further contended that under G.O.Ms.No.94, dated 1.7.2003, which holds the field at present, registrations are undertaken only in the months of January & June, and there is not even a possibility for the third respondent, to obtain registration, as at present.

If it were to be a case where the award of contract was to depend on the satisfaction of the respondents 1 and 2 and nothing else, the fact that whether a tenderer is a registered contractor, or not, would have become either secondary, or irrelevant. Where, however, a condition is stipulated that a tenderer must be a registered contractor, it cannot be ignored or brushed aside. It is true that in **A.Sreeramulu v. Superintending Engineer, R&B**, a Division Bench of this Court held that even

where a tenderer does not hold registration, as on the date of issuance of tender forms, he cannot be disqualified to participate in the process, and the relevant stage for verification in this regard, is the assignment of the contract, as such. After referring to certain decisions, as well as the orders and clarifications issued by the Government on the subject, the Division Bench held as under:

> "So read, we are of the view that the action of the first respondent in issuing tender schedules to the second respondent subject to the latter giving a written undertaking that it would produce fresh registration certificate of Class-I Contractor, cannot be faulted."

From this, it is evident that even if a tender form can be issued to an unregistered contractor, with an undertaking to produce the certificate by the date of finalisation, the contract cannot be awarded in the absence of such a registration. Therefore, whatever may have been the justification for the respondents 1 and 2, in receiving the tender of the third respondent and processing the same, though it was not registered as Class-I contractor, the contract can be awarded to third respondent, if only it gets registration by that time. In other words, the third respondent cannot be awarded the contract, unless it is registered as Class-I contractor under G.O.Ms.No.94, dated 1.7.2003.

For the foregoing reasons, W.P.No.22311 of 2005 is dismissed, as infructuous. W.P.No.22877 of 2005 is disposed of, directing that the third respondent, who emerged as the lowest tenderer, can be awarded the contract, in pursuance of the tender, notice dated 13.6.2005, if only it obtains the registration as
Class-I contractor under G.O.Ms.No.94, dated 1.7.2003, and not otherwise. There shall be no order as to costs.

(L.NARASIMHA REDDY, J)

Dt.09.11.2005

L.R.copies be marked.

(B/o)

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